

Review Staff - [REDACTED]

DCI Morning [REDACTED] 75-8523

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REVIEW STAFF

75-3037

MEMORANDUM FOR: Morning Meeting Participants

Attachment A was prepared by Attorney General Levi and presented to the members of the Intelligence Coordinating Group at the White House at 9:00 this morning.

We were also asked to submit a one-paragraph statement of each Agency's "solution" with respect to the current impasse. Your comments on the attached draft (Attachment B) will be appreciated. We should be getting our paragraph to the White House by the close of business today. Consequently, I don't believe we can wait until after the 5:30 meeting.

STATINTL [REDACTED]

Special Counsel to the Director

Memorandum as to Some of the Issues Raised

1. On the power of Congress to declassify documents --

It can be said that Congress does not have the right to declassify documents, and most certainly not without congressional legislation. It can be urged that it is constitutionally impermissible for Congress to declassify documents classified by the President in the national security and foreign affairs area. One can cite Justice Stewart's opinion (joined by Justice White) in the Pentagon Papers, 403, U.S. 713, 729-30, and the Nixon case, 418 U.S. 683, 704 (1974).

But the argument about this right somewhat misses the point. A Congressional committee may have no right to declassify a document, but it has the power to publish the document in its possession. The publication then places the writing in the public domain and works the declassification--a tantamount declassification. There is no legal remedy through the courts for the Executive to punish or restrain the publication. See Gravel v. U.S. 606 (1972); Doe v. MacMillan, 412 U.S. 306 (1973).

2. On the right of the President to withhold documents whose disclosure would be harmful to the interests of the United States when there is no assurance that necessary confidentiality will be maintained.

The Supreme Court in the Nixon case for the first time explicitly recognized that there is an executive privilege constitutionally based. In a more general way, the privilege to withhold may arise out of statutory assigned duties, but, of course, those statutes can be changed. For the situation at hand, it seems clear that the President faced with the threat and the likelihood of the exercise of the congressional committee's ability to accomplish public dissemination, has the right and the duty to withhold particularly sensitive documents until he has received satisfactory assurances. If the document is sufficiently sensitive, it is almost certain this right would be upheld against a subpoena. But the necessity for confidentiality must be well based. I do not believe the withholding would be upheld as a sanction but rather as a necessary protection of a

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It would be well to recognize even when a strong claim of privilege can be advanced, that the scope of the privilege is not sufficiently defined in cases, that to some extent it is constitutionally based on the necessity to protect the decision-making process, but that when so viewed it may be quite narrow, that it is broader for those areas constitutionally assigned to the President, but in those areas, the Congress also has powers.

3: The suggested approach

The approach should be one of seeking to obtain from the Select Committees appropriate assurances that they will maintain the confidentiality of the documents where in the judgment of the Executive disclosure would be seriously harmful to the interests of the nation.

It should be made clear continually that the Executive is not seeking to withhold documents from the Committees, although in collaboration with the Committees there should be agreements (as there has been with the Church Committee) on certain most sensitive information which may be deleted.

But that the right of the Committees (Select Committees) to have the documents (1) can be suspended if the Committee's conduct and lack of assurances threatens the security of the information, and (2) is not tantamount to a right in the Committee to release the information.

Since as the President has indicated, classification may have been overused, it would be appropriate to make sure that documents withheld do come within the President's privilege.

One must expect that in a court test the privilege may be narrowly defined in terms of particular documents or parts of documents.

9/23/75
EHL

Draft Statement of CIA Position with Respect
to Production of Classified Materials

The DCI will review all materials sought by the Committee to determine whether such information:

1. concerns or affects current foreign operations or activities whose existence has heretofore never been formally acknowledged; and
2. the disclosure of which would be seriously detrimental to the national interest.

If the DCI determines that particular materials sought by the Committee do concern or affect secret current foreign operations or activities, the disclosure of which would be seriously detrimental to the national security, he will make such materials available to the Committee only upon appropriate prior assurances by the Committee that it will not make public disclosure of them and only after deleting specific sources and methods.

If the DCI determines that particular materials sought by the Committee do not concern secret current foreign operations or activities, or disclosure of which would not be seriously detrimental to the national interest, he will delete references to specific sources and methods of intelligence and make the materials available to the Committee. With respect to the classified materials therein, the Committee will not publicly disclose such materials until it has given the DCI reasonable

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notice and a opportunity to consult with the Committee prior
to making public disclosure.

Appropriate verification of the deleted materials will
be arranged between the Committee and the DCI.